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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, *et al.*,

Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PETITIONERS

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JURISDICTION.

The statement as to jurisdiction in respondents' brief is inaccurate in several respects.

The Petitioners argue not only that the decision of the Supreme Court of Illinois denies them due process of law under the 14th Amendment but, as well, that by the decision the State of Illinois has abridged the privileges and immunities of each and all of the Petitioners as citi-

zens of the United States and has denied to each and all of the Petitioners the equal protection of its laws.

The petitioners in their brief reply for reversal upon each and all of the grounds urged in their brief. The charge of Petitioners of the denial of due process of law by wrongful application of the doctrine of *res judicata* is based upon the denial of the fundamental requirements of due process of law, to-wit, notice, the benefit of notice, the right to appear and to a real opportunity to defend. These rights were denied the petitioners independently of the fraudulent jurisdictional character of the *Burke* v. *Kleiman* proceedings held as *res judicata* against the petitioners. By sustaining the *Burke* v. *Kleiman* proceedings as *res judicata,* and holding thereby that the said proceeding was a representative or class action, the Illinois Supreme Court erroneously deprived each and all of the petitioners of the benefit of notice in the case now on review and a real opportunity to defend.

The fraud going to the jurisdiction of the court in the *Burke* v. *Kleiman* proceedings in the allegations as to the existence of the agreement and that there was a class to be represented (which fraud persisted throughout the proceedings both in the lower court and the State Appellate Court by means of the procurement of the decree by a false stipulation of facts and pleadings collusively produced), constitute an independent ground for petitioners' claims of denial of due process of law. The petitioners rely principally upon each and all of the grounds urged, but certainly the error of the Illinois Supreme Court is the more flagrant in view of the patently fraudulent character of the *Burke* v. *Kleiman* proceedings.

All of the other grounds argued in the brief of the Petitioners are argued with equal earnestness by the Petitioners.

The assertion in the jurisdictional statement in Respondents' brief that "The application of the doctrine of *res judicata* is primarily a matter of the law of Illinois" and that "The question here is limited to whether there is evidence to support the findings below that *Burke* v. *Kleiman, supra,* was a decision in a class or representative action, reached in good faith and not fraudulent or collusive" is obviously erroneous. The issue here involved is whether the State has denied to each and all of the Petitioners due process of law, whatever may be the settled law of the State of Illinois. Equal protection of the laws is not necessarily due process of law. Partiality of the State Supreme Court in reversing its settled law of 100 years is raised by the dissenting opinion in the case now on review. (R. 333, 334.)

STATEMENT.

Inaccuracies in the "Statement" in the brief of respondent confuse the clarity of the issues presented by this review.

Essentially an alleged restrictive agreement containing an alleged mutual restrictive covenant is involved herein. This is not a case involving single and independent covenants affecting single and independent parcels of property; the covenants here are sought to be created by the agreement and the existence of each and all are dependent upon the existence of the agreement. (R. 3, 4.)

The respondents' brief does not point out where any proof appears in the record that the owners of 95% of the frontage executed the agreement, nor any showing in the record of computation of frontage by the Woodlawn Property Owners Association. On pages 11 and 12 of their brief the respondents state that they relied on

their plea of *res judicata* in respect to the *Burke* v. *Kleiman* proceedings, and *further,* on their objections to petitioners' computations, the affidavit of Charles A. Churan, counsel for Woodlawn Property Owners Association (also principal counsel for the respondents in the State courts in the case here on review), as to the frontage signed, the affidavit of George W. Cook, a director of the aforesaid association as to computations, their amended complaint which reduced the total frontage involved, and showing of additional signatures recorded after the recording date required by the agreement. Record citations as to these items are given. In respect to these, procedurally, the Petitioners were denied the right of cross-examination, and by the sustaining of the Respondents' plea of *res judicata* the Petitioners were deprived of the benefit of the evidence adduced in their behalf on these very points in respect to which Respondents claim the record shows proof in their behalf. The fact that the Respondents now state that they relied upon the evidence in the record before the State Supreme Court to support the lower court's decree, shows that the Petitioners were denied the right to defend as to matters opened for proof by the plaintiff-Respondents. And the decree with its finding that only 54% of the frontage signed the agreement, must be assumed to have been made in consideration of this showing in the record relied on by the Respondents as well as upon the evidence tendered by the Petitioners.

In respect to the cases stated by Respondents as involving the agreement sought to be enforced in this cause reference is made to the statement made by Petitioner Burke in his answer herein (R. 30, 32 and 33) showing that the existence of the agreement was never in fact proved. Reference is also made to the decree in *Cook* v. *Yondorf* (R. 299) showing that the property

therein sought to be bound was not held to be bound. Reference is also made to the decree in *Penoyer* v. *Cohn* (R. 301), showing the decree to be upon the default of all of the defendants. The record shows that the decree obtained in 1936 was never enforced. (R. 190, 301.)

The "statement" in respondents' brief abounds in prejudicially cited items in the record and it is inappropriate under these circumstances to correct the unfair inferences made therefrom by the respondents. We are confident that in our original brief an accurate, fair and impartial statement of the case has been made for the review by this court. Indeed, we believe that the citations referred to by Respondent in most instances emphasize the fair character of the Petitioners' statement of the case.

With regard to what the evidence tended to show in support of the trial Chancellor's finding that the *Burke* v. *Kleiman* proceedings were fraudulent, we respectfully submit that this record shows not only that the *Burke* v. *Kleiman* proceedings were fraudulently instituted and maintained, as especially exhibited by the character of the pleadings therein (R. 218-246), 185, but the whole of the transactions in respect to the alleged agreement involved in the case on review, have been fraudulent.

ARGUMENT.

I.

This Court will review the finding of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

The above principle of law has been well settled by this Court in the case of *Kansas City Southern Railway Company* v. *C. H. Albers Commission Company*, 223 U. S. 573 at 591, in which case this court used the following language:

> "While it is true that upon a writ of error to a State Court we cannot review its decision upon pure questions of fact, but only upon questions of law appearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and fact a decision of the latter."

This court has also held that it will examine the evidence where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatsoever to support. See *Cedar Rapids Gas Light Company* v. *Cedar Rapids*, 223 U. S. 655; *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U. S. 246 at 261;

Norris v. *Alabama,* 294 U. S. 587 at 590; *Truax* v. *Corrigan,* 257 U. S. 321, 324-325.

This Court has likewise stated the principle of law applicable to the facts in this case at bar in the case of *Davis* v. *Wechsler,* 263 U. S. 22 at 24, in which the following statement was made:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon legal grounds."

In order to determine whether there has been a denial of a Federal right of the Petitioners to due process of law under the Fourteenth Amendment it would be necessary for this Court to examine all of the facts and circumstances and record, including pleadings in the case of *Burke* v. *Kleiman,* the decree of which was pleaded and sustained as *res judicata* against the Petitioners. Unless the Court did examine the facts of this case and the facts of *Burke* v. *Kleiman* a grave injustice would result to the Petitioners because the denial of their Federal Constitutional rights to due process of law under the Fourteenth Amendment has been cloaked under the pretext of *res judicata* a procedural device of local law in Illinois. The judgment and opinion of the Supreme Court of the State of Illinois sustained an alleged rule of State pleading or procedure, that is *res judicata,* arbitrarily and unreasonably to avoid a decision upon the question of a Federal right to due process of law under the Fourteenth Amendment. This court has held that rules of State pleadings or procedure may not be used arbitrarily and unreasonably as a mere cloak or pretext to avoid or evade a decision upon a Federal Constitutional right. See *Patterson* v. *State of Alabama,* 294 U. S. 600

at 602; *Davis* v. *Wechsler,* 263 U. S. 22 at 24. In the last named case this Court used the following applicable language:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

We wish to point out that the topical sentence in the respondents' Brief on page 15 to this effect "the finding of fact by the Illinois Supreme Court that the only fraud in this record is on petitioners is supported by competent evidence and conclusive here" is a wholly incorrect statement of what is in the Illinois Supreme Court opinion. The Supreme Court of Illinois, in referring to the case of *Burke* v. *Kleiman* (R. 467-468) and to some of Burke's alleged actions, made the following statement:

> "As far as the record shows, if any fraud was committed, it was by Burke after he left the association. (R. 468.)"

The petitioners do not admit, but in fact vigorously deny that Burke committed any fraud whatsoever, but on the contrary he ceased his efforts to enforce a restrictive agreement which he finally learned did not exist. Certainly a man commits no fraud when he learns the error of his ways in connection with a fraudulent nonexistent restrictive agreement and thereafter attempts to atone for his wrongdoing in having previously made efforts to enforce said nonexistent agreement. Burke attempted to correct the harm that he had done which is much more than can be said of the respondents in this case.

But even so, it is perfectly plain that the Supreme Court of Illinois made absolutely no statement whatever

that any fraud had been committed by the petitioners. The Supreme Court of Illinois made an unwarranted charge of fraud against James Joseph Burke. The record in this case and the record in the case of *Burke* v. *Kleiman* proves conclusively that the Woodlawn Property Owners Association caused to be filed a *false complaint* alleging the existence of a restrictive agreement which had been executed by the owners of ninety-five per cent of the frontage when in truth and in fact it was known to Fred L. Hellman, Executive Secretary of said Association, for a period of three and one-half years prior to the filing of the case of *Burke* v. *Kleiman* that there was NO restrictive agreement whatsoever and that it had never come into force and effect according to its own terms. (R. 203-206.)

The affidavit of Fred L. Hellman was never at any time contradicted nor was there offered in opposition to it any evidence or affidavit by anyone whatsoever, and being uncontradicted and unrebutted, it stands as a conclusive fact. Moreover, the Chancellor found in his decree that the alleged restrictive agreement was executed *by less than the owners of ninety-five per cent of the frontage* (R. 72 at 78), and besides the Chancellor in his oral decision made a definite finding of fact that the agreement was nonexistent and invalid according to its own terms. (R. 191 at 193.)

Under the law of the State of Illinois, all allegations of fact which are not fairly and certainly denied by some pleading or affidavit in opposition thereto, are deemed to be admitted under the provisions of the Civil Practice Act. The facts in the Answer of James Joseph Burke were never denied or rebutted.

II.

Granting for the sake of the argument that private land owners may contract for the control and disposition o their own property, yet it is true that the enforcement o such an agreement by the States' Courts and judicia officers is a violation of the Fourteenth Amendment.

The petitioners have nowhere in their Brief contende that private landowners do not have the right to contrac for the control and disposition of their own property b executing an agreement binding themselves not to se or lease their property to colored people. Such an agree ment might possibly be valid among the property owner themselves and might carry with them whatever re straints and sanctions that might exist among themselve by the execution of such an agreement, and would b valuable to them in aid of any public opinion sought t be maintained among neighboring landowners. But is the contention of these Petitioners that the *enforcemer* of such a harsh, oppressive, and discriminatory restri tive agreement against Negroes solely on account o their race or color deprives Negroes of their equal Con stitutional rights to own and acquire property *when white persons are willing freely to convey such propert to them.* The petitioners do not contend that such a re strictive agreement among private landowners is invali but they contend that the *enforcement by the States Courts and Judicial Officers* in fact makes an agreemer *judicially* when the legislature of the State is powerles to make one *legislatively.* See *Buchanan* v. *Warley,* 24 U. S. 60; *Chicago, Burlington & Quincy Railway Com pany* v. *Chicago,* 166 U. S. 228.

What is involved in the case at bar is the right of

Negro to own property freely conveyed by a white person willing so to convey. There is no contention whatsoever that the Fourteenth Amendment gives Negroes *the right to compel white persons to convey property to them.* We do contend, however, that J. B. Crook, a white person, being willing to convey to Hansberry, a Negro, had a perfect right to do so and that after the conveyance was made that the enforcement of an alleged restrictive agreement against the Hansberrys solely on account of their race or color was a denial of due process of law and the equal protection of the laws under the Fourteenth Amendment to the Federal Constitution. The petitioners likewise contend that Katz, if he chose to do so, had a right to sell his property to Negroes.

III.

The Illinois law upon the doctrine of res judicata is inapplicable where there is a denial of the Federal right to due process of law in violation of the Fourteenth Amendment.

The Respondents have cited a long list of Illinois Supreme and Appellate Court cases all of which are inapplicable to the facts of the case at bar and are improperly applied to the facts of this case. The respondents have wholly misapprehended the contentions of the Petitioners in this court. We do not complain of any mere error of the Supreme Court of Illinois in applying the local law of the State of Illinois in respect to the doctrine of *res judicata.* We contend that the application of the doctrine of *res judicata* by the State Courts was a denial of due process of law and the equal protection of the laws because the sustaining of the plea of *res judicata* wrongfully denied the petitioners the *benefit* of notice

and a real opportunity to appear, to defend, and to be heard, and that the Federal Constitutional rights of the petitioners were thereby violated. See *Postal Cable Telegraph Co.* v. *New Port,* 247 U. S. 464; *Windsor* v. *McVeigh,* 93 U. S. 274; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673; *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38.

Although it is true that this Court ordinarily recognizes that *res judicata* is a question of local law, nevertheless this Court has always examined the particular facts and circumstances of each case in which the plea of *res judicata* has been sustained, for the purpose of determining whether the litigant has been denied the benefit of notice, and a real opportunity to appear, to defend and to be heard. See *Ward* v. *The Board of County Commissioners of Love County, Okla.,* 253 U. S. 17, 22, 23; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Postal Cable Telegraph Co.* v. *New Port,* 247 U. S. 464 at 475-476; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673.

In the case of *Kersh Lake Drainage County Commissioners* v. *Thompson,* 309 U. S. 485, cited by respondents in their brief, this Court refused to apply the doctrine of *res judicata* against landowners each of whom had various *personal* defenses to the levy and extension of certain drainage taxes, and held that each landowner had a right to defend as to the particular amount of taxes owed by him, and further *that each landowner had personal defenses peculiar to such landowners and that such personal and peculiar defenses could not be foreclosed or precluded by the application of the doctrine of res judicata,* which if applied would deny to such landowners the right and benefit of notice and a real opportunity to appear, to defend, and to be heard.

In the case at bar each of the alleged parties signatory

to the alleged but nonexistent agreement, had a right to set up the personal defenses of lack of due execution of the agreement, alteration of the instrument, forgery, change in the character of the neighborhood, and the signing of said instrument upon the express condition that the signature of such signer would be a nullity if the owners of ninety-five per cent of the frontage of said area did not in fact execute and deliver said instrument.

The wrongful application of the doctrine of *res judicata* denied the petitioners their Federal constitutional rights because the petitioners were thereby foreclosed, barred, and prevented from setting up and successfully maintaining (as shown by the record of this case and the case of *Burke* v. *Kleiman*) all of the above mentioned defenses which were *personal and peculiar* to each of them.

The fact that the Supreme Court of Illinois ignored the Federal Constitutional question raised by petitioners does not foreclose such contentions in this Court. In the case of *Ward* v. *The Board of County Commissioners of Love County, Okla.*, 253 U. S. 17, 22, this Court made the following statement:

> "It therefore is within our province to inquire not only whether the (Federal) right was denied in express terms, but also, whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. Of course, if non-federal grounds *plainly untenable*, may be thus put forward successfully, our power to review may easily be avoided."

The sustaining of the plea of *res judicata* against petitioners by the Supreme Court of Illinois was a mere cloak and pretext put forward to avoid a decision upon the question of the denial to Petitioners of the Federal

Constitutional right to due process of law under the Fourteenth Amendment. See *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Ward* v. *The Board of County Commissioners of Love County, Okla.,* 253 U. S. 17-22; *Patterson* v. *The State of Alabama,* 294 U. S. 600, 602.

IV.

The State Court decree does offend the Fourteenth Amendment.

For the reasons set out in Petitioners' brief, the decree of the Superior Court of Cook County affirmed by the Supreme Court of Illinois, did result in a deprivation of petitioners' rights and property in violation of the Fourteenth Amendment to the Federal Constitution. The Respondents attempt to limit the application of the Fourteenth Amendment unduly by a purposeful disregard of the provision in the Amendment extending the equal protection of the laws to all citizens. The instant cause is not one where the situation referred to by Respondents exists. Under Point 4 in their Brief Respondents fallaciously apply the reasoning of "*Corrigan* v. *Buckley,*" 299 Fed. 899, by stating that *the constitutional privilege of a Negro to own property* does not carry with it the constitutional right to compel the sale and conveyance of any particular property. The respondents, in the use of the language of that case, support the contention of the Petitioners, that there is a constitutional privilege in the Negro as a citizen of the United States to own property and that in fact property ownership is one of the essential attributes of citizenship. Surely the constitutional privilege carries with it the right to freedom from arbitrary and wilful seizure of property by duly constituted state agencies.

The Respondents further, in Point IV, in their brief have apparently undertaken the responsibility of rewriting some of the basic holdings of constitutional law. They refer to the property of the Petitioners Hansberry and state blandly that this is the only property involved and that therefore, the Petitioners Hansberry are the only ones that have a basis for asserting the protection of the Fourteenth Amendment. The respondents thus blow hot and cold. They would on the one hand disregard the rights of the Negro as a citizen, which were asserted by the Fourteenth Amendment, and on the other disregard the extension of the Fourteenth Amendment to the protection of other than real property rights, asserted in a long line of decisions in this Court.

There is property referred to in the record for the application of the due process clause of the Fourteenth Amendment. The Petitioner Katz was denied the effective use of his property by the state court decree. The petitioner, Supreme Liberty Life Insurance Company, was denied its right to do business and a valid mortgage lien was impaired in a manner inconsistent with the instrument sued on. The Petitioners Hansberry were, of course, despoiled of their property, which was arbitrarily taken from them by the agents and officers of the state court. Respondents err seriously when they confine property rights to those in real property as they apparently do in their brief.

Respondents cite the case of *"Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Company,"* 243 U. S. 157 at 166, in support of the general proposition that the due process clause cannot in and of itself take up the laws of the several states and make a question pertaining to them a constitutional question. This the Petitioners have not sought to do. In the case cited, which was

an action to determine the relative rights of parties to divert water, this court held that no jurisdiction existed to review a matter when a state court judgment is based on two grounds, one of which involves a Federal question and the other not. The court, however, expressly stated that where the non-Federal ground is so interwoven with the Federal question, court will take jurisdiction of the matter. In the case cited, the chief contention was quite apparently the misapplication of the state law. In the instant case the respondents clearly set out in their brief the Federal ground based on a deprivation of due process caused by the wrongful application of the doctrine of *res judicata* and the arbitrary and unlawful seizure of property by state agents.

Respondents make a serious misstatement when they state in their brief that the petitioners are at liberty to acquire and exercise all of the rights and ownership of real estate in Chicago, except the small area, which was the subject matter of the action below. A reference to Petitioners' brief will again impress the court with the serious social situation resulting where so many Negro citizens have been compressed into a small area, with a portion of that area suffering from a purported restrictive agreement.

In passing, it should be noted that the principle in the case of *Colgate* v. *Harvey,* 296 U. S. 404, 472, was not overruled by the case of *Madden* v. *Kentucky,* 309 U. S. 83 at 93. The *Madden* v. *Kentucky* decision stated that the right to deposit money in banks is not a privilege of National citizenship. The decision did not reject the idea of a National citizenship for which purpose the *Colgate* v. *Harvey* case was cited in Petitioners' brief.

V.

Specific performance in the instant case did offend the Fourteenth Amendment.

The decree of the state court required the Petitioners Hansberry to convey their property without compensation. To state otherwise is to disregard the statement in the decree entered by the trial chancellor. The decree, in ordering the conveyance by the Master in Chancery in the Superior Court, did not perform the function of a writ of assistance as claimed by the respondents. Here, in an action where the basic agreement expressly provided against forfeiture, persons were stripped and divested of legal title as distinguished from possession after a finding by a court of competent jurisdiction upon a full hearing of the merits, which would be required for the issuance of a writ of assistance.

The doctrine in *Svelina* v. *Sarvans,* 341 Ill. 236, cited by Respondents, is clearly inapplicable in the instant cause. In that action a conveyance was made for the purpose of defrauding and cheating creditors. Under such circumstances any court would be justified in refusing the return of the consideration. In the instant cause the Petitioners Hansberry, consistent with their rights as citizens of the United States, paid a valuable consideration for title with no thought of defrauding or cheating anyone. There were no restrictions contained in the deed. Surely there is no justification for bringing this set of circumstances under the doctrine of the case cited.

The respondents should not further confuse the issue by referring to cases where the restriction appears in the deed of conveyance. It should again be noted that the restrictive agreement itself expressly provided against forfeiture.

VI.

The record does not support the injunction against the Petitioner Katz.

Petitioners refer again to their brief in answer to the statement made in Point VI of Respondents' brief. The decree *could not oblige Katz to abide by his own agreement* when all of the facts in the record show that he never intended to enter into the agreement and certainly never made any specific threats such as would justify the injunction.

VII.

The insurance company is exempt as a mortgagee.

Since the purported restrictive agreement clearly exempts mortgagees from the operation of the agreement, it is difficult to see how the decree can be justified as against the Insurance Company and how further the doctrine of *res judicata* could apply to it since it was not in any sense a party or privy to the case of *Burke* v. *Kleiman*. The Petitioners state a bald unsupported conclusion when they state that the agreement protects the mortgage by restoring the property to merchantable status when in fact it does the opposite.

Respectfully submitted,

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